

Florida Law Review

Volume 60

Issue 4 *September 2008*

Article 5

11-18-2012

False Statements v. Free Debate: Is the First Amendment a License to Lie in Elections?

Simon A. Rodell

Follow this and additional works at: <http://scholarship.law.ufl.edu/flr>



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Simon A. Rodell, *False Statements v. Free Debate: Is the First Amendment a License to Lie in Elections?*, 60 Fla. L. Rev. 947 (2008).
Available at: <http://scholarship.law.ufl.edu/flr/vol60/iss4/5>

This Case Comment is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

CASE COMMENTS

FALSE STATEMENTS V. FREE DEBATE: IS THE FIRST AMENDMENT A LICENSE TO LIE IN ELECTIONS?

Rickert v. Public Disclosure Commission, 168 P.3d 826 (Wash. 2007)

*Simon A. Rodell**

The petitioner, Marilou Rickert, ran as a Green Party candidate for a seat in the Washington state senate.¹ During her campaign, Rickert distributed a brochure that falsely represented the voting record of her opponent, incumbent Senator Tim Sheldon.² Sheldon filed a complaint with the Washington Public Disclosure Commission (PDC)—the governor-appointed commission charged with enforcing Washington’s false-campaign-speech statute.³ The statute prohibited sponsorship, with “actual malice,” of “[p]olitical advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office.”⁴ Several months after Sheldon’s landslide

* J.D. 2008, University of Florida Levin College of Law; M.B.A. 2008, University of Florida Hough Graduate School of Business. Thank you to my many friends on the Florida Law Review for your support and friendship. Thank you especially to Dustin Hall for your help with this Comment, and for being such a great friend and advisor. For my best friend and fiancée, Jessica Mueller.

1. *Rickert v. Pub. Disclosure Comm’n (Rickert II)*, 168 P.3d 826, 827 (Wash. 2007). In 2002, Rickert ran against incumbent Senator Tim Sheldon, a Democrat. *See* Brad Shannon, *Judge Backs Fine Against Green Party Candidate*, OLYMPIAN (Olympia, WA), Apr. 24, 2004, at 1C.

2. *Rickert II*, 168 P.3d at 827–28. Specifically, the brochure stated that Rickert supported “social services for the most vulnerable of the state’s citizens” but that Sheldon “voted to close a facility for the developmentally challenged in his district.” *Id.* at 827. In an administrative hearing before the Washington Public Disclosure Commission (PDC), Rickert testified that the facility to which she referred in her brochure was a youth camp in Belfair, Washington. *Rickert v. Pub. Disclosure Comm’n (Rickert I)*, 119 P.3d 379, 381 (Wash. Ct. App. 2005). However, Sheldon twice voted against the bill mandating closure of the camp. *Id.*

3. *See Rickert II*, 168 P.3d at 827. The five members of the PDC serve five-year terms and are appointed by the governor with the consent of the senate. WASH. REV. CODE ANN. § 42.17.350(1)–(2) (West 2008).

4. The statute provides, in relevant part:

(1) It is a violation of this chapter for a person to sponsor with actual malice:

(a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate’s agent about the candidate himself or herself;

....

(2) Any violation of this section shall be proven by clear and convincing evidence.

re-election, the PDC held an administrative hearing to investigate the complaint.⁵ The PDC imposed a \$1,000 fine, concluding that the brochure contained material false statements, that Rickert sponsored the brochure with actual malice, and that her violation of the statute had been proven by clear and convincing evidence.⁶ A Washington superior court judge upheld the fine,⁷ but the Washington Court of Appeals reversed.⁸ Applying strict-scrutiny review⁹ to the statute, the Washington Supreme Court HELD that the statute was unconstitutional because it caused “the government, rather than the people, [to] be the final arbiter of truth in political debate.”¹⁰

Before Washington passed the statute, candidates could turn only to defamation law when someone made a false statement about them. Defamation law allows an individual to recover in tort for injury to his reputation.¹¹ The tort allows an individual “to vindicate his good name” and to obtain redress for harm caused by defamatory false statements.¹² A statement is defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹³ To recover for defamation in

§ 42.17.530, *invalidated by Rickert II*, 168 P.3d 826. Under the statute, “‘actual malice’ means to act with knowledge of falsity or with reckless disregard as to truth or falsity.” *Id.* § 42.17.020(1); *see also infra* notes 32–34 and accompanying text.

5. *Rickert II*, 168 P.3d at 828; *Rickert I*, 119 P.3d at 381 (“Senator Sheldon was re-elected . . . by approximately 79 percent of the vote.”).

6. *Rickert II*, 168 P.3d at 828. Under the statute, the PDC has authority to determine whether a violation has occurred and to “issue and enforce an appropriate order following such determination.” § 42.17.395(1).

7. *Rickert II*, 168 P.3d at 828; Shannon, *supra* note 1.

8. *Rickert I*, 119 P.3d at 380.

9. Courts “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Under typical “strict scrutiny” analysis, the government must prove that the regulation at issue is necessary to further a compelling government interest. *See, e.g., Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). The Supreme Court has also formulated the standard as requiring a compelling government interest and narrowly tailored means. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *see also* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* § 6.5 (3d ed. 2006) (describing the various levels of scrutiny applied in constitutional litigation).

10. *Rickert II*, 168 P.3d at 827.

11. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* 2-3 (2007) (“‘At its core, an action for defamation is intended to protect an individual’s interest in maintaining a good reputation.’” (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994))). Defamation law includes two torts: libel and slander. RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:10 (2d ed. 2007). At common law, libel provided redress for defamation “by written or printed words, or by the embodiment of the communication in some tangible or physical form” *Id.* § 1:11. Slander provided redress for defamation by spoken words or by “transitory gestures.” *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 568 (1977) (distinguishing between libel and slander).

12. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

13. RESTATEMENT (SECOND) OF TORTS § 559 (1977); *see also* SMOLLA, *supra* note 11, § 4:1 (noting that another “popular approach is to define ‘defamatory’ by stringing together a long litany

Washington, a plaintiff must prove that (1) the defendant made a false statement about the plaintiff; (2) there was an unprivileged communication of the statement; (3) the defendant made the statement negligently, recklessly, or intentionally; and (4) the statement damaged the plaintiff's reputation.¹⁴ For public officials—and for candidates for public office—reputation is especially important.¹⁵ Recognizing the importance of reputation, the common law “presumed” damages from a defamatory statement, allowing a plaintiff to recover without proving actual damage to his reputation.¹⁶

In contrast, the First Amendment to the U.S. Constitution forbids Congress or the states from passing any law “abridging the freedom of speech.”¹⁷ “Freedom of speech is crucial in a democracy: Open discussion of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government’s choice of policies.”¹⁸ The trick, then, becomes finding the appropriate

of colorful pejoratives”); *id.* §§ 4:2–4:5 (describing various approaches to determining whether a statement is defamatory). When “assessing whether a publication is susceptible to a defamatory meaning, it is not dispositive that a numerical majority of its audience would arrive at a non-defamatory interpretation”—words may be actionable if they damage a person’s reputation “among a considerable and respectable class of people.” *Stanton v. Metro Corp.*, 438 F.3d 119, 127 (1st Cir. 2006); SMOLLA, *supra* note 11, § 4:5.50 (describing the “reasonable” or “average” reader for purposes of defamation law).

14. *Rickert v. Pub. Disclosure Comm’n (Rickert I)*, 119 P.3d 379, 384 (Wash. Ct. App. 2005); *see also* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (“To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”); 50 AM. JUR. 2D *Libel and Slander* § 21 (2008).

15. 15 SMOLLA, *supra* note 11, § 1:1 (describing the importance of reputation in Anglo-American culture). The Supreme Court holds that criticism of candidates for public office is accorded the same First Amendment protection as criticism of public officials. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971) (“[I]t is abundantly clear that . . . publications concerning candidates [for elective public office] must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.”).

16. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (“The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication.”).

17. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”). Under the incorporation doctrine, the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

18. *CHEMERINSKY*, *supra* note 9, § 11.1.2, at 926; *see also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment ‘has its fullest and most urgent

balance between allowing public officials to vindicate their reputations through defamation law and protecting open discourse of political issues under the First Amendment—discourse that would be chilled by potential tort liability.¹⁹

In *New York Times Co. v. Sullivan*,²⁰ the U.S. Supreme Court placed a constitutional check on defamation law, holding that the First Amendment limits a public official's right to recover for defamation.²¹ In *New York Times*, a civil-rights group paid for a full-page newspaper advertisement asking for donations to support civil-rights protests by African American college students in the South.²² The advertisement also contained factual errors, including mischaracterizations of police actions in Montgomery, Alabama.²³

After the *New York Times* refused to retract the advertisement, L.B. Sullivan—a Montgomery City Commissioner who supervised the city's police department—filed a libel suit against the newspaper and several Alabama clergymen who purportedly endorsed the advertisement.²⁴ Sullivan argued that the advertisement damaged his reputation by criticizing the police force.²⁵ The Alabama Supreme Court agreed, finding it “common knowledge that the average person [would] know[] that municipal agents, such as police and firemen, . . . are under the control and

application' to speech uttered during a campaign for political office.” (quoting *Monitor*, 401 U.S. at 272)).

19. CHEMERINSKY, *supra* note 9, § 11.3.5.2, at 1045.

20. 376 U.S. 254 (1964). For an exhaustive review of this case, see ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1992); *see also* Thomas Kane, Note, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 762–72 (1999).

21. *See New York Times*, 376 U.S. at 283.

22. *Id.* at 256–57. The advertisement stated three purposes for the funds: to support (1) “‘thousands of Southern Negro students . . . engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution’”; (2) “‘the struggle for the right-to-vote’”; and (3) the legal defense of Dr. Martin Luther King, Jr., against a pending perjury indictment. *Id.* at 256–57.

23. *Id.* at 258–59. Several statements in the advertisement were false: The advertisement stated that students had sung “My Country, 'Tis of Thee,” but the students actually sang the National Anthem, *id.*; the advertisement stated that several students were expelled for leading a demonstration at the Capitol, but the students were actually expelled for demanding service at a courthouse lunch counter on another day, *id.* at 259; the advertisement stated that state authorities had padlocked a dining hall on the Alabama State College campus “in an attempt to starve [the students] into submission,” but the dining hall was never padlocked on any occasion, *id.* at 257, 259; the advertisement stated that “truckloads of police armed with shotguns and tear-gas ringed” the campus, but the police never “ringed” the campus and were not called to the campus as a result of the demonstration at the Capitol, *id.*; finally, the advertisement stated that Dr. King had been arrested seven times, but he was actually arrested only four times, *id.* at 258–59.

24. *Id.* at 256, 261.

25. *Id.* at 258.

direction . . . of a single commissioner.”²⁶ The Alabama Supreme Court thus affirmed a \$500,000 jury award for Sullivan, reasoning that the advertisement constituted libel per se.²⁷

The U.S. Supreme Court reversed, finding that Alabama’s defamation law abridged the newspaper’s and the clergymen’s First Amendment rights.²⁸ The Court rejected Sullivan’s contention that the First Amendment does not protect libelous publications, reasoning that the state’s libel law must be measured “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²⁹ First, the Court reasoned that some “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”³⁰ Second, criticism that injures a government official’s reputation cannot lose its constitutional protection simply because it is defamatory—that is, defamatory statements must be protected.³¹ The Court concluded that a public official seeking redress for defamation must prove with “convincing clarity”³² that the statement was made with “actual malice”—i.e., with knowledge that it was false or with reckless disregard of its falsity.³³ According to the Court, this

26. *Id.* at 263.

27. *New York Times*, 376 U.S. at 256, 263. Under Alabama law, a publication was “‘libelous per se’” if the words tended to injure a person’s reputation or bring him into public contempt. *Id.* at 267; RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977) (defining “actionable per se”). More generally, libels per se include “[l]ibels whose defamatory meanings are apparent on their face.” SMOLLA, *supra* note 11, § 7:22. At common law, libels per se do not require special damages. *Id.* “[S]pecial harm” or “special damage” is a term of art in defamation law that “refers to ‘the loss of something having economic or pecuniary value.’” *Id.* § 7:2; *see also* RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

28. *See New York Times*, 376 U.S. at 292.

29. *Id.* at 268, 270. “[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” *Id.* at 269.

30. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

31. *Id.* at 273.

32. *Id.* at 285–86. The Court subsequently clarified that this language requires proof by “clear and convincing evidence.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331–32 (1974).

33. *New York Times*, 376 U.S. at 279–80. “From the outset, the ‘actual malice’ label was an infamously poor choice of words because the common law used the term ‘actual malice’ synonymously with ‘ill will,’ not reckless disregard of the truth.” Kane, *supra* note 20, at 774. The Court subsequently clarified many aspects of the actual-malice standard. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court stated that, to meet the actual-malice standard, the defendant must have uttered false statements with a “high degree of awareness of their probable falsity.” *Id.* at 74. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Louisiana Supreme Court applied an objective recklessness test, finding that the defendant had acted with actual malice by making serious accusations without verifying any of the factual assertions. *Id.* at 730. The U.S. Supreme Court rejected this analysis and applied a subjective test: A publisher acts with actual malice if there is

actual-malice standard properly balanced the competing interests of free expression and reputation protection by immunizing some false statements, such as honest misstatements, while compensating victims for the most damaging false statements.³⁴

In subsequent cases, the Supreme Court has continued to balance the competing policies behind the First Amendment and defamation law. In *Gertz v. Robert Welch, Inc.*,³⁵ the Court emphasized the importance of vindicating private individuals' reputations by holding that only public figures must meet the difficult-to-prove actual-malice standard.³⁶ *Gertz* involved a magazine that published an article falsely asserting that the plaintiff, a prominent local attorney, was a "Leninist" and a "Communist-fronter."³⁷ After a jury awarded \$50,000 to the plaintiff, the district court entered judgment for the magazine notwithstanding the verdict.³⁸ The district court found that the plaintiff failed to meet the actual-malice standard, reasoning that *New York Times* protects private individuals in addition to public figures.³⁹ The Supreme Court reversed and limited the actual-malice standard to defamation cases brought by public officials and public figures.⁴⁰

The *Gertz* Court's judgment reflects a balance of the competing interests at stake. When criticism of public figures is involved, the First Amendment has paramount importance.⁴¹ Despite the lack of "constitutional value in false statements of fact," the First Amendment requires protecting "some falsehood in order to protect speech that matters."⁴² Thus, to avoid media self-censorship, the Court reasoned that the First Amendment should protect any false statement about public figures made without actual malice.⁴³ A state's interest in compensating public figures for harm to their reputations is minimal because they generally have sufficient media access to reduce the impact of any defamatory statement and because public figures voluntarily expose themselves to the public eye.⁴⁴ For private defamation victims, however,

"sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 730–31.

34. *New York Times*, 376 U.S. at 278–83.

35. 418 U.S. 323 (1974).

36. *Id.* at 347–48.

37. *Id.* at 325–26.

38. *Id.* at 329.

39. *Id.*

40. *Id.* at 332, 342. *New York Times* involved a public official—a city commissioner—but the Supreme Court subsequently extended the *New York Times* standard to protect publications about "public figures." See *Curtis Publ'g Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130, 162 (1967) (Warren, J., concurring).

41. See *Gertz*, 418 U.S. at 340–41.

42. *Id.*

43. See *id.* at 340–42; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

44. *Gertz*, 418 U.S. at 344–45; see also SMOLLA, *supra* note 11, § 2:13 (discussing the

the Court recognized a state's legitimate interest in compensating injured parties by giving states free rein to define appropriate standards of liability, "so long as they do not impose liability without fault."⁴⁵

In the instant case, the Washington Supreme Court balanced the competing interests of free speech and reputation protection in a different setting. Unlike *New York Times* and *Gertz*, which were defamation cases,⁴⁶ the instant case involved a false-campaign-speech statute that allowed the PDC, a government agency, to determine whether campaign statements are false and to fine violators of the statute.⁴⁷ According to the court, the statute "erroneously 'presupposes [that] the State possesses an independent right to determine truth and falsity in political debate.'"⁴⁸ The court noted that the Washington legislature intended to limit the scope of the statute to "the unprotected category of political defamation speech" identified by *New York Times*.⁴⁹ But because the statute did not require proof of the defamatory nature of the speech, the court held that the statute covered both protected (nondefamatory false statements) and unprotected (defamatory false statements) speech.⁵⁰ Because the statute limited protected speech, the court applied strict scrutiny⁵¹ and invalidated the statute because the legislature failed to identify a compelling government interest and failed to narrowly tailor the statute to further such an interest.⁵²

"access to media" argument); *id.* § 2:14 (discussing the "assumption of risk" rationale). *But see* Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 860–61 (2006) (arguing that, in light of the proliferation of the Internet, "courts should look to the plaintiff's relative access to corrective counterspeech to determine whether the actual malice standard is appropriate").

45. *Gertz*, 418 U.S. at 347.

46. *Id.* at 325; *New York Times*, 376 U.S. at 271.

47. *See* Rickert v. Pub. Disclosure Comm'n (*Rickert II*), 168 P.3d 826, 832, 847 (Wash. 2007); *see also* WASH. REV. CODE ANN. § 42.17.530 (West 2008), *invalidated by Rickert II*, 168 P.3d 826. For the text of the statute, *see supra* note 4.

The instant case is not the first time that the Washington Supreme Court has reviewed the constitutionality of the statute. In *Public Disclosure Commission v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the court invalidated a previous version of the statute. *Id.* at 699. The old statute prohibited sponsoring, with actual malice, political advertising that contains a false statement of material fact. WASH. REV. CODE ANN. § 42.17.530 (West 1997). The court invalidated the statute because it brought "within its sweep every maliciously false statement of 'material fact' whether it is defamatory to an individual or not." *119 Vote No! Comm.*, 957 P.2d at 696. The legislature subsequently amended the statute by limiting its proscription to false statements of material fact "about a candidate for public office." 1999 Wash. Sess. Laws, ch. 304, § 2(1)(a).

48. *Rickert II*, 168 P.3d at 827 (alteration in original) (quoting *119 Vote No! Comm.*, 957 P.2d at 695).

49. *Id.* at 828.

50. *Id.* at 828–29.

51. *Id.* at 829; *see also supra* note 9 (listing the two elements of strict-scrutiny review of the constitutionality of a statute: (1) the statute must be narrowly tailored and (2) necessary to further a compelling government interest).

52. *Rickert II*, 168 P.3d at 829–31; *see also* *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First

The PDC proffered two government interests to support the statute: (1) protecting candidates for public office; and (2) preserving the integrity of elections.⁵³ The court rejected the first interest, stating that “there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues or individual candidates.”⁵⁴ Moreover, the state forfeited any interest in compensating private individuals for harm to their reputations because the statute lacked a mechanism to compensate victims—any fine collected by the PDC went to the state.⁵⁵ Finally, the court found that the statute was neither narrowly tailored nor necessary to further the government interest of protecting candidates, because the statute did not require that the statement be of a kind that tends “to cause harm to an individual’s reputation, i.e., defamatory.”⁵⁶

The court also rejected the state’s proffered interest in preserving the integrity of elections.⁵⁷ The court acknowledged that the state could have a compelling interest in protecting direct harm to elections, but found that prohibiting “arguably false, but nondefamatory, statements about political candidates to save our elections conflicts with the fundamental principles of the First Amendment.”⁵⁸ The court further asserted that the statute was underinclusive⁵⁹ because it did not apply to many statements that pose an

Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.”).

53. *Rickert II*, 168 P.3d at 829–30.

54. *Id.* at 830 (emphasis omitted).

55. *Id.*

56. *Id.*

57. *Id.* at 830–31.

58. *Id.* at 831.

59. The underinclusiveness argument in the instant case stems from the U.S. Supreme Court’s decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the Supreme Court invalidated a St. Paul ordinance that prohibited placing, on public or private property, a symbol or object that “one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *Id.* at 380, 396. In an attempt to save the constitutionality of the ordinance, the Minnesota Supreme Court interpreted the ordinance narrowly, limiting its application to fighting words. *Id.* at 381. Writing for the majority, Justice Scalia reasoned that “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” *Id.* at 391. The ordinance was underinclusive because it applied “only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender,’” and permitted “[d]isplays containing abusive invective, no matter how vicious or severe, . . . unless they are addressed to one of the specified disfavored topics.” *Id.* Further, the statute sanctioned viewpoint discrimination because it permitted proponents of tolerance and equality to display the disfavored symbols or objects while forbidding the use of a symbol to express a racist sentiment. *Id.* at 391–92. “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 392. See generally Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 849 (2005) (arguing that, when addressing content-based restrictions on unprotected speech, courts should ask (1) “whether a content-based regulation of unprotected

equal threat to the integrity of elections; the statute exempted all statements made by a candidate about himself, allowing a candidate to lie freely about himself but prohibiting his opponent from making the same statement.⁶⁰ This exemption demonstrated that the statute was not narrowly tailored to protect the integrity of elections.⁶¹

The four dissenting justices asserted that the majority had invited politicians “to lie with impunity.”⁶² According to the dissent, the actual-malice standard “is both a necessary and a sufficient standard for regulating false campaign speech.”⁶³ The dissent argued that calculated falsehoods and deliberate lies subvert the political process and are unprotected by the First Amendment.⁶⁴ Thus, the *New York Times* actual-malice standard would properly balance the First Amendment constitutional concerns with the Washington legislature’s asserted interests.⁶⁵ The dissent reasoned that Washington’s statute was constitutional because it addressed only statements about public officials and candidates for public office, and it required the PDC to prove by clear and convincing evidence both the falsity of the statement and actual malice.⁶⁶ The dissent argued that the actual-malice standard would not subvert political speech because it is an intentionally difficult standard to satisfy, and that applying the standard “will beneficially serve the voters, the candidates, and the democratic process.”⁶⁷

The Washington Supreme Court’s analysis reflects the omnipresent constitutional tension between defamation law and the First Amendment. The majority’s first concern—that Washington’s statute does not require the false statement to be defamatory—can be easily fixed by the legislature. But the real disagreement in the instant case arises from a more fundamental issue. Some commentators view Washington’s false-

speech relates substantially to a harm of the same nature, but more compelling, than that against which the larger unprotected speech category is directed” and (2) whether “a regulation threatens protected speech in a manner not likely to be identified through a general standard.”).

60. *Rickert II*, 168 P.3d at 831.

61. *Id.*

62. *Id.* at 833 (Madsen, J., dissenting).

63. *Id.* at 840. The dissent relied heavily on *Brown v. Hartlage*, 456 U.S. 45 (1982), and *Garrison v. Louisiana*, 379 U.S. 64 (1964), to support its assertion that the actual-malice standard is necessary and sufficient for regulating false campaign speech. *Rickert II*, 168 P.3d at 836–37 (Madsen, J., dissenting). This reliance is misplaced. In *Brown*, the Court invalidated a statute lacking both an actual-malice requirement and a requirement that the statement be defamatory. 456 U.S. at 54, 61–62. And in *Garrison*, the statements at issue were both true and defamatory. 379 U.S. at 66, 76. The U.S. Supreme Court has not ruled on the appropriate protection for false but nondefamatory statements made about public officials. See *Rickert II*, 168 P.3d at 830 n.7.

64. *Rickert II*, 168 P.3d at 837–38 (Madsen, J., dissenting).

65. *Id.* at 840–43.

66. *Id.* at 841; see also *CHEMERINKSY*, *supra* note 9, § 11.3.5.2, at 1046 (listing the four constitutional requirements for defamation claims by public officials).

67. *Rickert II*, 168 P.3d at 844 (Madsen, J., dissenting).

campaign-speech statute as the first step toward allowing Big Brother, in the form of the PDC and the Washington legislature, to curb First Amendment rights.⁶⁸ Meanwhile, the dissent believes that modern elections have gone haywire and that Washington's statute is necessary to protect our democratic government from lying politicians.⁶⁹

The majority's first concern can be resolved by amending the statute. The majority asserted that nondefamatory false statements about public figures made with actual malice are protected by the First Amendment.⁷⁰ Because all the cases discussing defamatory statements arose from defamation cases, the majority asserted that a statement must be defamatory—i.e., cause injury—to lose its constitutional protection.⁷¹ The Washington legislature can fix this concern by inserting language into the statute requiring that the false statements be defamatory. Indeed, the legislature has already proposed amendments to its statute,⁷² and the sixteen other states with similar laws can surely conform their statutes to address this concern.⁷³

68. Editorial, *Debate Must Thrive in Our Political Battles: Lying About Opponents is in the Great American Political Tradition*, NEWS-SENTINEL (Fort Wayne, Ind.), Oct. 8, 2007 [hereinafter *Debate Must Thrive*] ("The best way to sort out lies is through robust debate, which government should not interfere with."); Editorial, *Spinners, Sinners and Campaign Lies*, NEWS TRIBUNE (Tacoma, Wash.), Oct. 7, 2007, at 2 ("An unelected panel of governor's appointees—the PDC—certainly shouldn't serve as the designated truth squad in election season."). See generally GEORGE ORWELL, 1984 (Penguin Group 1961) (1949) (describing the experiences of Winton Smith, a clerk of the Ministry of Truth, who runs afoul of Big Brother, the dictator of the totalitarian government of Oceania).

69. *Rickert II*, 168 P.3d at 833 (Madsen, J., dissenting) ("The majority opinion advances the efforts of those who would turn political campaigns into contests of the best stratagems of lies and deceit, to the end that honest discourse and honest candidates are lost in the maelstrom."); see also *Debate Must Thrive*, supra note 68 ("What happens now is the voters will be subjected to an incredible onslaught of lies and misinformation at the end of campaigns." (quoting Wash. Sen. Tim Sheldon)); Joseph Turner, *Honestly: Candidates May Lie: State Supreme Court Refuses to Police Speech in Political Campaigns*, NEWS TRIBUNE (Tacoma, Wash.), Oct. 5, 2007 ("The campaigns are going to go further into the gutter, I think." (quoting Wash. Sen. Tim Sheldon)).

70. *Rickert II*, 168 P.3d at 828–29 & n.7.

71. *Id.* at 829–30 & n.7.

72. This addition will also likely force the legislature to remove the exception for a candidate's false statements about himself—presumably, a candidate is unlikely to publish a false statement about himself with the intent to injure his own reputation. Both the Washington Senate and the Washington House of Representatives have proposed these amendments to the statute since *Rickert II*. See S.B. 6202, 60th Leg., Reg. Sess. (Wash. 2008); H.B. 2852, 60th Leg., Reg. Sess. (Wash. 2008). The absence of this language may be the reason that Washington declined to petition this case to the U.S. Supreme Court. Presumably, the Washington Legislature will amend the statute, and the Washington Supreme Court will have another opportunity to review the statute's validity—this time with the Legislature's asserted interests squarely in issue.

73. For the other states' statutes, see ALASKA STAT. § 15.13.095 (West 2008); COLO. REV. STAT. ANN. § 1-13-109 (West 2008); FLA. STAT. ANN. § 104.271 (West 2008); LA. REV. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2008); MINN. STAT. ANN. § 211B.06 (West 2007); MISS. CODE ANN. § 23-15-875 (West 2008); MONT. CODE ANN. § 13-37-131 (2007); N.C. GEN. STAT. ANN. § 163-274(a)(8) (West 2007); N.D. CENT. CODE § 16.1-10-04 (2008);

However, overcoming the court's rejection of the Washington legislature's asserted government interests will be more difficult. The Washington Supreme Court rightly recognized that, although Washington's statute incorporates the constitutional balance for defamation cases struck by the *New York Times* standard,⁷⁴ the government interests at stake in *New York Times* change dramatically in the context of false-campaign-speech statutes.⁷⁵ As discussed in *Gertz*, the *New York Times* standard balances the First Amendment rights of the press with the state interest in compensating citizens for injuries to their reputations.⁷⁶ But application of the statute in the instant case involves neither the press nor any state interest in compensating defamation victims.

Plainly put, the Washington legislature failed to assert a compelling government interest because the statute does not permit the PDC to compensate victims of false statements. The statute asserts that its purpose is "to provide protection for candidates for public office."⁷⁷ Although the statute presumably protects candidates from some criticism, it does not allow candidates to collect for injuries caused by false statements.⁷⁸ Without any compensatory interest to even the constitutional balance reached in *New York Times*, the protection of the First Amendment prevails.⁷⁹ Further, although the Supreme Court has recognized a legitimate government interest in compensating victims, it has never recognized a legitimate interest in protecting candidates for political office

OHIO REV. CODE ANN. § 3517.21 (West 2008); OR. REV. STAT. ANN. § 260.532 (West 2007); TENN. CODE ANN. § 2-19-142 (West 2007); UTAH CODE ANN. § 20A-11-1103 (West 2007); W. VA. CODE ANN. § 3-8-11 (West 2008); WIS. STAT. ANN. § 12.05 (West 2007).

74. See *supra* notes 28–34 and accompanying text (describing the constitutional balancing in *New York Times*).

75. See *Rickert II*, 168 P.3d at 830 (noting that a state interest in compensating private individuals cannot justify government-enforced censorship schemes like Washington's false-campaign-speech statute).

76. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 342–48 (1974).

77. *Rickert II*, 168 P.3d at 829 (quoting 1999 Wash. Sess. Laws, ch. 304, § 1(3)).

78. See *id.* at 830; WASH. REV. CODE ANN. § 42.17.390 (West 2008) (listing the remedies available under the Washington false-campaign-speech statute).

79. See *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("[A] State has a legitimate interest in upholding the integrity of the electoral process . . . But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated."); Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 138 ("[L]ibel law is premised on a special concern with protecting individual reputation. That concern is not present with other types of false statements in public debate. Of course, government does have an interest in protecting the quality of public debate. But it would be difficult to explain why a broader restriction (reckless disregard rather than knowing falsehood) is more necessary in the context of public debate than in the context of the judicial process."); see also Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 61 (2003) ("Tactics that restrict expressive liberties must give way to strategies that successfully reconcile the perennial tension between individualized autonomy and the interests of the body politic in fair and honest elections.").

from criticism.⁸⁰ In fact, the First Amendment has the opposite effect, recognizing a “profound national commitment” to protecting the people’s right to criticize candidates for public office.⁸¹

The PDC also asserted an interest in preserving the integrity of elections to justify the statute.⁸² Admittedly, a state may have a compelling interest in preventing harm to elections.⁸³ But the government does not, as the majority asserted, have a legitimate interest in determining truth or falsity in political debate.⁸⁴ Nor is the government capable of “negotiating the thin line between fact and opinion in political speech.”⁸⁵ Indeed, in the words of Justice Jackson, “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”⁸⁶ Thus, even if the government may punish false and defamatory speech through defamation actions, the government has no legitimate interest in appointing an agency to determine whether statements uttered during a political campaign are false.⁸⁷ The statute’s insertion of a truth-finding government agency into the middle of a political campaign conflicts with the fundamental thrust of the First Amendment: encouraging “uninhibited, robust, and wide-open” debate on public issues.⁸⁸

80. *Rickert II*, 168 P.3d at 830 (citing Gertz, 418 U.S. at 348).

81. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

82. *Rickert II*, 168 P.3d at 830.

83. *See id.* at 830–31 (collecting cases recognizing compelling government interests in preventing direct harm to elections); *see also* Davis v. Fed. Elec. Comm’n, 76 U.S.L.W. 4675 (June 26, 2008) (noting a compelling government interest in eliminating corruption or the perception of corruption in elections, but finding that interest insufficient to justify the “substantial burden” on First Amendment rights caused by the statute).

84. *Id.* at 829; *see* Stone, *supra* note 79, at 138, 140 (arguing that a law prohibiting false statements of fact during public debate would be unconstitutional “because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate.”).

85. *Rickert II*, 168 P.3d at 829.

86. *Meyer v. Grant*, 486 U.S. 414, 419–20 (1988) (alteration in original) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

87. Stone, *supra* note 79, at 140 (arguing that allowing the government to punish false statements during public debate “invites abuse that could be profoundly destructive to public debate.”).

88. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *cf.* Stone, *supra* note 79, at 139–40. *But see* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300–22 (2004) (arguing that the Supreme Court’s recognition of a state’s interest in preventing campaign distortion and voter alienation in the context of campaign finance laws suggests that the Court would allow the same interests to justify state limitations on campaign speech).

The Washington Supreme Court's decision rightly calls into question similar statutes nationwide. Many states, including Florida, have laws substantially similar to Washington's.⁸⁹ These statutes all assert as justification similar paternalistic concerns for protecting elections and candidates.⁹⁰ But these justifications cannot support government censorship of political debate.⁹¹ Although many commentators claim that electioneering behavior by political candidates has gotten out of hand,⁹² this problem has been around for decades.⁹³ And in the instant case, Rickert received her proper punishment for uttering a false statement about her political opponent: she lost badly at the ballot box.⁹⁴

In 2008, like in any election year, political candidates will straddle the line between spinning facts and misstating them.⁹⁵ But the American

89. See *supra* note 73.

90. E.g., LA. REV. STAT. ANN. § 18:1463(A)(2008); 1999 Wash. Sess. Laws, ch. 304, § 1(3).

91. See Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 698–99 (Wash. 1998) (invalidating a prior version of Washington's false-campaign-speech statute because the state's asserted compelling interest in "shield[ing] the public from falsehoods during a political campaign is patronizing and paternalistic").

92. See, e.g., Kane, *supra* note 20, at 759 n.36 (acknowledging that politics has always been a nasty business, but stating that the "rancor of modern campaigns is qualitatively different because of the presence of television"); Marshall, *supra* note 88, at 291 (noting that modern political advertisements are "designed primarily to elicit emotional response rather than convey rational persuasion, and are purposefully one-sided and manipulative").

93. In 1949, one commentator stated: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 875 (1949); see also George Chase, Note, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 346, 346 (1889) (describing a similar political environment sixty years earlier).

94. See *supra* note 5 and accompanying text; see also Tom Henderson, *Mommy, He Told Fibs About Me! Fine Him \$1000*, LEWISTON MORNING TRIBUNE (Idaho), July 5, 2006, at 6A ("If liars are shooting themselves in the foot anyway, the lie carries its own punishment. People like Sheldon can fight their own battles without asking Mommy—in the form of the state—to fight them instead."). Although Rickert may have lost anyway, getting caught in a lie about her opponent certainly could not have improved her electability.

95. Perhaps the most memorable "spin" so far this season was Hillary Clinton's recollection of a trip to Bosnia while her husband was President. Hillary Clinton claimed: "I remember landing under sniper fire. There was supposed to be some kind of a greeting ceremony at the airport, but instead we just ran with our heads down to get into the vehicles to get to our base." Katherine Q. Seelye, *Clinton 'Misspoke' About Bosnia Trip, Campaign Says*, THE CAUCUS, N.Y. TIMES POLITICS BLOG (Mar. 24, 2008), <http://thecaucus.blogs.nytimes.com/2008/03/24/clinton-misspoke-about-bosnia-trip-campaign-says/?scp=2-b&sq=hillary+clinton+sniper+lies&st=nyt> (Mar. 24, 2008, 13:42 EST). However, photographs and videos taken at the greeting ceremony show that Hillary Clinton was greeted on the tarmac by a smiling eight-year-old girl who read Clinton a poem. See Michael Dobbs, *Hillary's Balkan Adventures, Part II*, THE FACT CHECKER BLOG (Mar. 21, 2008), http://blog.washingtonpost.com/fact-checker/2008/03/hillarys_balkan_adventures_par.html (Mar. 21, 2008, 06:00 EST). For a video containing footage of Clinton's arrival in Bosnia and her campaign comments, see *CBS Exposes Hillary Clinton Bosnia Trip*, http://www.youtube.com/watch?v=-6M41YqM_xk&feature=related (last visited June 29, 2008).

electorate does not need its government to determine truth in political debate. Perhaps the U.S. Supreme Court should remind us of Justice Brandeis's words in *Whitney v. California*: the proper remedy is "more speech, not enforced silence."⁹⁶

96. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).